Filed 5/25/07 K.D. v. Superior Court CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

K.D., Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al., Real Parties in Interest.	B197601 (Los Angeles County Super. Ct. No. CK60498)

ORIGINAL PROCEEDING. Writ petition pursuant to rule 8.452 of the California Rules of Court. Robert L. Stevenson, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition granted.

Law Offices of Alex Iglesias, Pamela Rae Tripp and David Moore for Petitioner.

No appearance for Respondent.

Raymond G. Fortner, Jr., County Counsel, and Frank J. Da Vanzo, Principal Deputy County Counsel, for Real Party in Interest Los Angeles County Department of Children and Family Services.

Children's Law Center of Los Angeles and Helen Lee for the Child.

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Petitioner K.D. (mother) is the mother of four children -- nine-year-old J.H., six-year-old T.S., three-year-old J.S., and five-month-old J.S. Only the youngest child is the subject of this writ proceeding.[1]

Mother has a history of illicit drug use. As a result, in 2005, the Los Angeles County Department of Children and Family Services (Department) detained her then three children, placed them in foster care, and filed a dependency petition on their behalf. Mother received approximately nine months of family reunification services, but failed to make progress dealing with her drug abuse problems. Therefore, in June 2006, the juvenile court terminated reunification services and set a hearing for the selection and implementation of a permanent plan for the three children (Welf. & Inst. Code, § 366.26).[2] The propriety of that ruling is not at issue in this writ proceeding.

J.S. was born in December 2006. Although toxicology tests performed on both mother and J.S. were negative, the Department detained J.S. shortly after her birth and filed a dependency petition on her behalf based on mother's history of substance abuse and failure to reunify with her three older children. The

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1 All subsequent references to J.S. are to the five-month-old child who is the subject of this writ proceeding.

2 All statutory references are to the Welfare and Institutions Code.

Department recommended that reunification services not be provided to mother. Less than a month after J.S. was detained, mother entered a residential drug treatment program. The adjudication and disposition hearings took place a little over one month after mother entered the program. In the interim, mother submitted to the only drug test requested of her. The result was negative. Nonetheless, the court concluded mother's residential drug treatment program participation and negative test result were insufficient, and it denied her reunification services under section 361.5, subdivisions (b)(10) (court may deny services where it previously terminated services for a sibling of the dependent child and the parent did not subsequently make a "reasonable effort to treat the problems that led to removal of the sibling"), and (b)(13) (parent has a history of "extensive, abusive and chronic use of drugs" and has resisted prior court-ordered treatment for the problem).[3]

Mother filed a writ petition challenging the court's decision. (Cal. Rules of Court, rule 8.452.) She claims the decision to deny her reunification services is not supported by substantial evidence.

Both the Department and counsel for J.S. oppose the granting of relief.

We agree with mother that substantial evidence does not support the court's decision to deny her reunification services. Accordingly, we grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

In April or June 2005, the Department began providing mother and C.S. (father of all but mother's oldest child) with family maintenance services.[4]

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3 All undesignated references to statutory subdivisions are to the subdivisions of section 361.5.

4 The record contains a paternity questionnaire from February 2007 in which both mother and C.S. declare they are married. C.S. was involved in the dependency proceedings in the juvenile court but is not a party to this writ proceeding. Therefore, the discussion below focuses on mother. Unless otherwise specified, all references to "father" are to C.S.

However, in September of that year, the Department detained mother's then three children, placed them in a foster home, and filed a dependency petition on their behalf. The petition, as later sustained, alleged that the three children were at risk because mother and father had an unresolved history of drug abuse and were current cocaine users.

Over the next approximately nine months, mother and father received family reunification services. During this time, mother enrolled in a couple of drug treatment programs, but failed to follow through. In mid-June 2006, the court terminated reunification services for mother and father because of their failure to comply with the case plan and scheduled a hearing for the selection and implementation of a permanent plan for the three children.

At the end of August 2006, mother called the Department social worker handling her case to advise that she and father were moving from one motel to another and to request assistance in finding a free drug treatment program. In September 2006, the social worker provided mother with a referral.

At the end of September 2006, mother's sister advised the social worker that mother was in a drug treatment program and that she was six and one-half months pregnant. As it turned out, mother had not enrolled in the drug treatment program.

On December 31, 2006, mother gave birth to J.S. Toxicology tests for both mother and J.S. were negative, and the two were discharged from the hospital. However, several days later, the Department detained J.S., placed her in the same foster home as her siblings, and filed a dependency petition on her behalf. The petition did not allege that mother was currently using drugs. It alleged only that mother had a history of substance abuse, including cocaine abuse, which rendered her incapable of providing J.S. with regular care or supervision. The petition contained similar allegations with respect to father.

The detention report stated that in September 2006, mother called the children's foster mother and told her that she did not care about the Department or

about the court's orders because she would use her unborn child to replace the older children. The report also stated that a relative of mother had recently called the foster mother to ask if she could assist mother and J.S. with shelter as they had no place to live. In the report, the Department recommended that mother not be provided with reunification services and that the court schedule a hearing for the selection of a permanent plan for J.S. for the same day as the permanent plan hearing for her siblings.[5]

At the conclusion of the detention hearing on January 8, 2007 (which parents did not attend), the court found a sufficient basis to warrant detention.

A few days later, an anonymous caller advised the social worker that the parents were at a particular motel. The caller claimed father was "heavily on drugs as well as the children's mother." The caller stated father was "very much in control of mother's behavior" and father had stolen mother's money to purchase drugs.

Based on this information, the social worker was able to contact the parents in their motel room. The social worker spoke with father, who refused to meet with the worker for an interview or to receive the citation directing the parents to appear at the next court hearing. Father hung up on the social worker.[6]

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[5] Although the court terminated reunification services in connection with J.S.'s siblings in June 2006, the permanent plan hearing has yet to take place. It has been continued numerous times because the foster mother has vacillated on whether she wishes to adopt the children, and apparently because the Department has not yet determined if she would be a suitable adoptive parent. The permanent plan hearing for the three oldest children is currently scheduled for June 11, 2007, the same day as the permanent plan for J.S.

[6] In the Department's reports, the social worker referred to the "parents" as refusing to meet with her and as hanging up on her. However, it appears the conversation was with father.

On January 30, less than one month after J.S. was detained, mother entered a nine-to-twelve-month residential drug treatment program. According to a letter from her counselor at the facility, mother was eligible to have monitored visits with J.S. at the facility, with the goal of having J.S. later join her to enhance the parent-child relationship.[7]

Two weeks later, mother submitted to the only drug test requested of her. She tested negative.

The adjudication with respect to the allegations involving J.S. took place in early March. Without objection, the court admitted into evidence the Department's detention and jurisdiction/disposition reports, as well as the "Information for Court Officer" documentation in which the Department advised the court that mother had enrolled in a residential drug treatment program and had tested negative for drugs on one occasion. The court also took judicial notice of the prior dependency petitions and orders relating to mother's three oldest children.

Two witnesses testified -- mother and the social worker who began handling mother's case when she was still receiving family maintenance services.

Mother confirmed that the court terminated her reunification services with respect to her three older children in June 2006 because of her substance abuse. She asserted she no longer had a substance abuse problem. She maintained she last used drugs in May 2006, before learning later that month that she was pregnant with J.S. Mother claimed she did not undergo drug testing while pregnant with J.S. because she was no longer receiving reunification services and did not have money to pay for testing.

Mother testified that she had been in a residential drug treatment program since January 30, 2007, and had submitted to one drug test (on February 12), which

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[7] About one month later, father enrolled in a drug treatment program at a different facility. Thus, he and mother are not together at this time.

came back negative. She has not tested more because she was required to submit to testing on only one occasion. Mother stated she was motivated not to use drugs anymore because she wants to get her children back.

Mother confirmed that she refused to meet with the social worker after J.S. was born because she had "issues" with the worker.

The social worker testified that the last drug test result she received for mother (presumably before the most recent negative test result from February 2007) was in May or June 2006, when reunification services with respect to the older children were terminated.[8] Mother tested positive for marijuana.

On direct examination by counsel for the Department, the social worker claimed that mother was required to submit to drug tests after reunification services were terminated but failed to do so. However, on cross-examination, she conceded that such testing was not required. Indeed, she testified that in making her decisions and recommendations, she did not view mother as having failed to appear for drug testing after reunification services were terminated.

According to the social worker, before reunification services for the older children were terminated, mother enrolled in a couple of drug treatment programs, which she failed to complete. After prior reunification services were terminated, the social worker referred mother to a free drug treatment program with free drug testing, but mother did not follow through. The social worker acknowledged that when J.S. was born, toxicology tests for both her and mother were negative.

The social worker testified that she was advised in January by someone "closely related" to one of the parents that mother was using drugs, but the social

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8 There is no documentary evidence in the record concerning this drug test. The only evidence on the issue came from the Department social worker at the adjudication.

worker did not want to disclose that person's name.[9] The court sustained hearsay objections to this testimony, but it was not asked to, ~~and it did not~~ nor did it, strike any of the testimony. Indeed, the court relied on the testimony in announcing its decision.

After the parties rested, counsel for the Department and for J.S. asked the court to deny mother reunification services. Counsel for the Department maintained mother still had a drug problem. The fact mother had recently enrolled in a drug treatment program and had tested negative on one occasion was "a start," but did not qualify as a "reasonable effort" to treat her drug problems.

Mother's counsel asked the court to award mother reunifications services. She stated there was no evidence mother had a current drug problem. Counsel emphasized the fact that J.S. was born healthy and that mother had enrolled in a residential drug program, where she had tested negative. This qualified as a "reasonable effort" to deal with her drug problem.

In announcing its decision on the adjudication, the court characterized the case as a "relatively close [one], even with the preponderance of evidence standard" applicable to an adjudication. However, it sustained the petition. The most compelling factor for the court was the fact that mother had tested positive in May or June which, based on the normal period of gestation, would be when she was already pregnant with J.S.[10] The court also gave some weight to the call the

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9 This was a reference to the "anonymous" call the social worker received, advising her of the parents' whereabouts, and claiming that father was "heavily on drugs as well as the children's mother" and that father had stolen mother's money to purchase drugs.

10 The court's statement that mother had tested positive in May or June 2006 is not an accurate characterization of the evidence. The social worker testified that she "received" a positive test result for mother in May or June. She did not indicate when the test took place. No other evidence concerns the date of this test. (We

Department social worker received after J.S.'s birth, advising that mother was using drugs. The court believed it was appropriate to draw some inferences from this evidence considering mother's history of drug use. Finally, the court noted it had received nothing from mother indicating that she had done anything to deal with her problems from the termination of reunification services for the older children (June 2006) and the birth of J.S. (December 2006). This was particularly disconcerting given the fact that the social worker provided mother with a referral for free drug testing.

After sustaining the petition, the court proceeded to the disposition where it found by clear and convincing evidence that returning J.S. to mother's custody would place J.S. at substantial risk and that she could not be adequately protected short of removal.

The court then denied mother reunification services, finding by clear and convincing evidence that services should be denied (1) under subdivision (b)(10) because mother had not made a "reasonable effort" to treat the drug problems that led to the termination of reunification services relating to mother's older children, and (2) under subdivision (b)(13) because mother had a history of "extensive, abusive and chronic use of drugs" and had resisted prior court-ordered treatment for the problem within the three years preceding the filing of J.S.'s dependency petition.

The court then set a hearing for the selection and implementation of a permanent plan for J.S., which it scheduled for the same day as the older children's permanent plan hearing.

Mother filed a writ petition challenging the court's order. Mother does not challenge the sustaining of the dependency petition. Her sole contention is that

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note, however, that mother conceded she last used drugs in May 2006, though she claimed it was before learning later that month that she was pregnant with J.S.

substantial evidence does not support the court's decision to deny her reunification services.

The Department filed an answer opposing the granting of relief. Counsel for J.S. filed a joinder in the Department's answer.

DISCUSSION

1. The Standard of Review.

We review the juvenile court's findings of fact under the substantial evidence test, which requires us to determine whether reasonable, credible evidence of solid value supports the order. (*In re Brian M.* (2000) 82 Cal.App.4th 1398; *Curtis F. v. Superior Court* (2000) 80 Cal.App.4th 470.) In so doing, we must resolve all conflicts in support of the court's determination and indulge all legitimate inferences to uphold the court's order. If substantial evidence exists, we must affirm. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1020-1021; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820; *In re Katrina C.* (1988) 201 Cal.App.3d 540, 547; *In re Tracy Z.* (1987) 195 Cal.App.3d 107, 113.)

However, substantial evidence is not synonymous with any evidence. (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393.) "A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, '[w]hile substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; *inferences that are the result of mere speculation or conjecture cannot support a finding* [citations].' [Citation.] 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' [Citation.]" (*Id*. at pp. 1393-1394; accord, *In re David M.* (2005) 134 Cal.App.4th 822, 828.)

Where, as here, the challenged findings are subject to a heightened burden of proof (clear and convincing evidence), we must review the record in support of the findings in light of that burden. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing* (2000) 78 Cal.App.4th 847, 891 ["But since the jury's findings

were subject to a heightened burden of proof, we must review the record in support of these findings in light of that burden. In other words, we must inquire whether the record contains 'substantial evidence to support a determination by clear and convincing evidence . . . .' " (original ellipsis)].)[11]

"The 'clear and convincing evidence' test requires a finding of high probability, based on evidence '"'"so clear as to leave no substantial doubt" [and] "sufficiently strong to command the unhesitating assent of every reasonable mind."'"'" (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552, quoting *In re Angelia P.* (1981) 28 Cal.3d 908, 919.)

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11 Some decisions suggest the heightened burden of proof is irrelevant in the context of appellate review. (See *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881 ["The 'clear and convincing' standard specified in section 361.5, subdivision (b), is for the edification and guidance of the trial court and not a standard for appellate review. [Citations.] ' "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." [Citations.]' [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong'" (first and third brackets added, ellipsis in original)]; see also *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 602-604].

To the extent such cases stand for the proposition that the substantial evidence rule applies to the review of decisions with a heightened burden of proof, we agree. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 422-423; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.) However, to the extent the cases stand for the proposition that the burden of proof is irrelevant in determining whether substantial evidence exists, we take issue with them. (See *In re Basilio T.* (1992) 4 Cal.App.4th 155, 170 ["on appeal, the substantial evidence test is the appropriate standard of review. Thus, in assessing this assignment of error, 'the substantial evidence test applies to determine the existence of the clear and convincing standard of proof'"].)

2. Limited Exceptions Warrant the Denial of Reunification Services.

"'It is difficult, if not impossible, to exaggerate the importance of reunification in the dependency system.'" (*In re Albert T.* (2006) 144 Cal.App.4th 207, 217, quoting *In re Luke L.* (1996) 44 Cal.App.4th 670, 678.) "Section 361.5, subdivision (a) explicitly directs the juvenile court to order child welfare services for the minor and the minor's parents whenever a minor is removed from a parent's custody. This requirement implements the law's strong preference for maintaining the family relationship if at all possible." (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 474.) "The exceptions to this rule, listed in subdivision (b), are limited in number, narrow in scope, and subject to proof by the enhanced 'clear and convincing' standard." (*In re Rebecca H.* (1991) 227 Cal.App.3d 825, 843.)

It is important to keep in mind that "[i]f the evidence suggests that despite a parent's substantial history of misconduct with prior children, there is a reasonable basis to conclude that the relationship with the current child could be saved, the courts should always attempt to do so. Courts must keep in mind that '[f]amily preservation, with the attendant reunification plan and reunification services, is the first priority when child dependency proceedings are commenced.' [Citation.] The failure of a parent to reunify with a prior child should never cause the court to reflexively deny that parent a meaningful chance to do so in a later case. To the contrary, the primary focus of the trial court must be to *save* troubled families, not merely to expedite the creation of what it might view as better ones." (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1464.)

In this case, the juvenile court invoked two of the statutory exceptions -- those in paragraphs (10) and (13) of subdivision (b) -- to deny reunification services to mother. We consider these two in turn.[12]

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12 Under subdivision (c), the court may still award reunification services to a parent found to come within paragraphs (10) and (13) of subdivision (b), but only if it finds by clear and convincing evidence that reunification is in the best interest of

3. The Juvenile Court's Decision.

a. *Substantial Evidence Does Not Support the Denial of Services Under Subdivision* (*b*)(*10*).

Under section 361.5, subdivision (b)(10), reunification services need not be provided when the court finds by clear and convincing evidence that "[1] the court ordered termination of reunification services for any siblings . . . of the child because the parent or guardian failed to reunify with the sibling . . . after the sibling . . . had been removed from that parent or guardian pursuant to Section 361 . . . and [2] that, according to the findings of the court, this parent or guardian has not subsequently made *a reasonable effort* to treat the problems that led to removal of the sibling . . . of that child from that parent or guardian." (Italics added.)

In this case, mother does not dispute that the first prong was satisfied. She focuses exclusively on the second prong, claiming no substantial evidence supports the finding that she failed to make a "reasonable effort" to treat the drug problems that led to the removal of her three oldest children. We agree.

"'The inclusion of the "no-reasonable effort" clause in the statute provides a means of mitigating an otherwise harsh rule that would allow the court to deny services simply on a finding that services had been terminated as to an earlier child when the parent had in fact, in the meantime, worked toward correcting the underlying problems.'" (*In re Albert T.*, *supra*, 144 Cal.App.4th at p. 218, quoting *In re Harmony B.* (2005) 125 Cal.App.4th 831, 842.)

In this case, relatively scant evidence concerned mother's efforts to deal with her drug problems after the court terminated reunification services for her older

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the child. At the disposition hearing, mother did not invoke this provision and she presented no relevant evidence under this provision. Mother makes no argument concerning this issue in her writ proceeding. Therefore, we focus solely on the question whether substantial evidence supports the juvenile court's findings under subdivision (b).

children in June 2006. There was no evidence that mother *tested* positive for drugs after this date. The only direct evidence that mother *used* drugs at any time after June 2006 was the "anonymous" call the Department social worker received less than two weeks after J.S.'s birth, in which the caller appeared to indicate that mother was using drugs. Leaving aside the problematic nature of such evidence (to which the court sustained hearsay objections at the adjudication), the call focused on father's use of drugs. Indeed, the caller claimed father had stolen money from mother to purchase drugs. This suggests mother did not initiate, and may have opposed, the purchase of drugs. (Indeed, the caller stated father was "very much in control of mother's behavior.")[13]

On the other hand, it was undisputed J.S. was born drug-free, mother entered a residential drug treatment program (away from father) less than one month after J.S. was born, and mother tested negative for drugs on the one occasion when she was required to submit to such testing before the adjudication hearing. While this evidence in no way means that mother had overcome her drug problems or was ready to regain custody of J.S., we believe that it was sufficient, under the circumstances of this case, to establish that mother had made a "reasonable effort" to treat the problems that led to removal of her older children.

"[T]he 'reasonable effort to treat' standard found in . . . subdivision (b)(10) . . . is not synonymous with 'cure.'" (*Renee J. v. Superior Court*, *supra*, 96 Cal.App.4th at p. 1464; see also *Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 99 ["the Legislature used the adjective 'reasonable' to ensure that lackadaisical or half-hearted efforts would not be deemed adequate rather than to additionally require a certain level of progress"].) Mother still has a long way to go

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13 While it is true (and unfortunate) that mother failed to take advantage of a referral to a free drug treatment program in September 2006, there is no direct evidence that she was abusing drugs at the time.

before she is in a position to regain custody of J.S. But given her recent efforts, she is entitled to an opportunity to succeed.

b. *Substantial Evidence Does Not Support the Denial of Services Under Subdivision* (*b*)(*13*).

Under section 361.5, subdivision (b)(13), reunification services need not be provided when the court finds by clear and convincing evidence that "[1] the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and [2] has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible."

In this case, mother focuses on the first prong. She claims there was no substantial evidence that she had a "history of *extensive, abusive, and chronic* use of drugs." (Subd. (b)(13), italics added.) In particular, mother focuses on the phrase "chronic."

No authority construes the term "chronic" in this context. From the statutory language, some "history" of drug use is not sufficient to qualify as "chronic" drug use.[14] This conclusion is consistent with the plain meaning of the term "chronic," which connotes a condition lasting over an extended period of time. (See Webster's

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14 We know mother has a "history" of drug use because, among other things, the juvenile court sustained the allegation in the complaint that mother had such a history, and mother has not challenged that determination. However, subdivision (b)(13) requires an "extensive, abusive and chronic" history. In addition, the finding under subdivision (b)(13) must be made by clear and convincing evidence (as opposed to the preponderance of the evidence standard applicable to the adjudication).

3d New Internat. Dict. (2002) p. 402 [defining "chronic" as "marked by long duration, by frequent recurrence over a long time"].)

Although the case is a close call, we do not believe there was substantial evidence that mother had a "history of *extensive, abusive, and chronic* use of drugs." There was no evidence mother used drugs at any time before 2005. There was evidence of only two positive drug tests -- one in May 2005 and the other in approximately May 2006. As discussed above, the only evidence that mother used drugs at any time after May 2006 was the "anonymous" call the Department social worker received. This evidence is a far cry from the history found sufficient to support the denial of services under what is now subdivision (b)(13). (See *In re Levi U.* (2000) 78 Cal.App.4th 191 [mother had extensive drug problems extending over at least seven-year period]; *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 73 [38-year-old mother started drinking alcohol at age nine and started using drugs at age 12, and failed at least four attempts at rehabilitation].) We do not believe this evidence was sufficient to support the juvenile court's denial of services to mother in this case.

Mother's drug problems cannot be minimized. As noted above, mother still has a long way to go. However, she is legally entitled to an opportunity to succeed.

DISPOSITION

The writ petition is granted. The juvenile court is directed to vacate that portion of its March 5, 2007 order denying mother reunification services, and to thereafter conduct a new disposition hearing. Unless the court receives new evidence (i.e., evidence not before the court at the March 5, 2007 disposition) that would warrant the denial of services, the court is directed to enter a new disposition order awarding mother reunification services.

This opinion is final forthwith as to this court. (Cal. Rules of Court, rule 8.264(b)(3).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BOLAND, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.